Supreme Court, U.S.
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No. 87-145

In The
Supreme Court of the United States
October Term, 1987

ARCHIE M. BISHOP,

Petitioner,

vs.

STATE OF NEBRASKA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

BRIEF OF RESPONDENT STATE OF NEBRASKA IN OPPOSITION

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QUESTION PRESENTED

Whether the Nebraska Supreme Court properly reversed and remanded for a new trial the decision of the lower court denying the petitioner a right to a jury trial on a misdemeanor offense carrying a maximum penalty of more than six months while, simultaneously, affirming the lower court's decision denying the defendant a right to a jury trial on two petty offenses carrying a maximum penalty of seven days each.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
BRIEF OF RESPONDENT STATE OF NEBRASKA IN OPPOSITION	1
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	5
1. The theory or position by petitioner is contrary to that asserted by petitioner in the court below.	5
2. Conflicts presented by petitioner are easily distinguishable on their facts.	8
CONCLUSION	12

TABLE OF AUTHORITIES

Page

FEDERAL AUTHORITIES

Article V, United States Constitution 3, 5

Article VI, United States Constitution 2, 3, 5, 6, 10

Article XIV, United States Constitution 2, 3, 5, 10

CASES CITED

Baldwin v. New York, 399 U.S. 66 (1970) 7, 8, 10

Bowe v. Scott, 233 U.S. 658 (1914) 7

Haar v. Hanrahan, 708 F.2d 1547 (10th Cir. 1983) 8, 9, 11

Oxley Stave Co. v. Butler County, 166 U.S. 648 (1897) 6

Patton v. United States, 281 U.S. 276 (1930) 8

Tyrrell v. District of Columbia, 243 U.S. 1 (1917) 6, 7

United States v. Potvin, 481 F.2d 380 (10th Cir. 1973) 8, 9, 11

STATE AUTHORITIES

Article I, Section 1, Nebraska Constitution 3, 5

Article I, Section 3, Nebraska Constitution 3

Article I, Section 6, Nebraska Constitution 3, 5

Neb.Rev.Stat. § 24-536 (Reissue 1985) 2, 3, 4, 5, 8

Neb.Rev.Stat. § 39-669.07 (Reissue 1984) 4

Neb.Rev.Stat. § 39-669.08 (Reissue 1984) 4

CASES CITED

State v. Bishop, 224 Neb. 523, 399 N.W.2d 271 (1987) 8, 9, 10, 11

State v. Vernon, 218 Neb. 539, 356 N.W.2d 887 (1984) 8, 10

Vallejos v. Barnhart, 102 N.M. 438, 697 P.2d 121 (1985) 9, 11

BRIEF OF RESPONDENT STATE OF NEBRASKA IN OPPOSITION

Respondent, State of Nebraska, respectfully requests this Court to deny the petition for a writ of certiorari to review the judgment of the Nebraska Supreme Court.

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OPINION BELOW

The relevant opinion of the Nebraska Supreme Court appears in the appendix of the Petition for Writ of Certiorari.

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STATEMENT OF JURISDICTION

The judgment of the Nebraska Supreme Court was entered on January 16, 1987, affirming as modified the decision of Red Willow County Court on Count I, driving while intoxicated; affirming the decision of Red Willow County Court on Count II, criminal refusal; and reversing and remanding the decision of Red Willow County Court on Count III, resisting arrest. The petitioner did not properly raise and the Supreme Court of Nebraska did not enter a judgment on the particular federal question the petitioner now attempts to assert. The judgment of the Nebraska Supreme Court was based on Nebraska law and past decisions of this Court. Therefore, this Court should not take jurisdiction of a federal question not properly raised in the Nebraska Supreme Court.

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STATUTES OR CONSTITUTIONAL PROVISIONS

1. Sixth Amendment to the United States Constitution:

   In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed. . . .

2. Fourteenth Amendment to the United States Constitution, Section 1:

   [N]or shall any State deprive any person of life, liberty, or property without due process of law. . . .

3. Neb.Rev.Stat. § 24-536:

   Either party to any case in county court, except criminal cases arising under city or village ordinance, traffic infractions . . . may demand a jury trial.

———o———

STATEMENT OF THE CASE

On December 31, 1984, the petitioner was charged with driving while under the influence (Count I), refusing a chemical test (Count II), resisting arrest (Count III), and leaving the scene of a property damage accident (Count IV). On January 17, 1985, the petitioner was arraigned and pled not guilty to all four counts.

On February 6, 1985, the petitioner filed a motion requesting a jury trial on all counts. This motion was overruled by the county court for failure to comply with the rules of the County Court of the 14th Judicial Dis-

trict of Nebraska (rev. 1984). Rule 25 provides that all demands for a jury trial in misdemeanor cases must be made within ten days following the entry of a plea of not guilty.

On April 25, 1985, the petitioner renewed his motion for a jury trial and contended that the county court's ruling denying him a jury trial was in violation of Neb.Rev. Stat. § 24-536 (Reissue 1985); Section 3 and Section 6, Article I, of the Nebraska Constitution; and Articles V, VI, and XIV to the Constitution of the United States.

Neb.Rev.Stat. § 24-536 provides: Either party to any case in county court, except criminal cases arising under city or village ordinance, traffic infractions, and other infractions, . . . may demand a jury trial."

On April 25, 1985, the county court denied the defendant's motion for a jury trial and found the petitioner guilty of Count I, driving while intoxicated; Count II, refusal to submit to a chemical test; and Count III, resisting arrest. The county court found the petitioner not guilty of leaving the scene of a property damage accident.

The District Court of Red Willow County affirmed the decision of the lower court.

On appeal to the Nebraska Supreme Court, the petitioner sought review on various issues, one of which was whether the petitioner had a right to a jury trial on each count charged. The petitioner argued that he had a Sixth and Fourteenth Amendment right to a jury trial on the resisting arrest charge because it carried a potential penalty of over six months. He further alleged that he had a right to a jury trial on the driving while under the in-

fluence charge and the criminal refusal charge pursuant to Neb.Rev.Stat. § 24-536 (Reissue 1985). He contended that such demand for a jury trial need not be made in writing within ten days pursuant to Rule 25 of the 14th Judicial District of Nebraska. Petitioner further noted that such rule was not valid because it was not properly ratified.

The Nebraska Supreme Court found that because the petitioner was charged with driving while under the influence, pursuant to Neb.Rev.Stat. § 39-669.07 (Reissue 1984), and refusal to take a chemical test, pursuant to Neb.Rev. Stat. § 39-669.08 (Reissue 1984), he had a right under Neb. Rev.Stat. § 24-536 (Reissue 1985) to demand a jury trial. The court further found that a demand is required to invoke the statutory right to a jury trial and failure to file a timely request in accordance with the rules of the court constituted a waiver of the statutory right to a jury trial.

The Nebraska Supreme Court further found that the petitioner had a constitutional right to a jury trial on the resisting arrest charge because it carried a potential penalty of over six months and it was not knowingly and intelligently waived by the petitioner. The court thus reversed and remanded for a new trial the conviction of the petitioner on the resisting arrest charge.

The Nebraska Supreme Court affirmed the sentence and modified the fine to $200 in the driving while under the influence conviction and affirmed the conviction on criminal refusal.

On a motion for rehearing, the petitioner asked the Nebraska Supreme Court to review its decision. Such motion raised for the first time the issue that the Nebraska Supreme Court should have reversed the county

court on all three counts because the aggregate potential penalty on the three charges was over six months. On June 3, 1987, the court denied the motion without opinion.

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REASONS WHY THE PETITION SHOULD BE DENIED

1. The theory or position asserted by petitioner is contrary to that asserted by petitioner in the court below.

The question presented to this court by the petitioner is certainly not the question that was presented to the Nebraska Supreme Court. The petitioner in the trial court, the district court and the Nebraska Supreme Court asserted, among various other issues, the position that the petitioner was entitled to a jury trial on each of the three charges against the petitioner. The petitioner argued his right to a jury trial on each of these charges pursuant to Neb.Rev.Stat. § 24-536 (Reissue 1984); as well as Section 1 and Section 6, Article 1 of the Constitution of the State of Nebraska and the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The petitioner now asserts that the Sixth and Fourteenth Amendments entitled the petitioner to a jury trial because the aggregation of the penalties of the three charges initially faced by the petitioner totaled more than a six month potential penalty. Thus, the petitioner now argues he had a constitutional right to a jury trial regardless of Nebraska statutory rules and county court rules. This particular facet of petitioner's right to a jury trial was never before the court until the petitioner filed

a motion for rehearing before the Nebraska Supreme Court on January 21, 1987. The court denied this motion without an opinion on June 3, 1987. Certainly, at the rehearing stage it was too late for the petitioner to assert that his Sixth Amendment right also attached to the two petty offenses by virtue of the aggregated potential penalty of all three offenses being more than six months.

Furthermore, this court may review the final decision of the highest state only if the aggrieved party is "denied some title, right, privilege, or immunity . . . [and] it appear[s] from the record that such title, right, privilege or immunity was specially set up or claimed in the highest state court as belonging to such party under the Constitution or some treaty, statute, or commission or authority of the United States." *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 653 (1897).

> The fact that the Petitioners alleged a violation of their federal or constitutional rights is not sufficient. The federal question must be presented in the proper manner to the highest state court and it must appear that judgment was passed on the federal question. *Harding v. Illinois*, 196 U.S. 78, 86 (1904). A "vague objection" referring to the United States Constitution is not sufficient without any argument or authority in support of the objection. *Harding*, 196 U.S. at 88.

In *Tyrrell v. District of Columbia*, 243 U.S. 1 (1917) this court stated, "When . . . we discover that the question upon which the certiorari was prayed under the circumstances previously stated does not arise on the record [it] is not open for consideration, and therefore the Petition for Certiorari [is] rested upon a wholly unsubstantial and nonexisting ground." *Id.* at 243.

The court in *Tyrell* dismissed the writ because petitioner did not make an exception in the lower court to the question it raised in their Petition for Writ of Certiorari. Therefore, the question did not properly appear in the record and, thus, could not be considered.

Moreover, in *Bowe v. Scott,* 233 U.S. 658 (1914) this court stated:

> [I]t is elementary that a mere assertion in a state court of a right under the Constitution of the United States in a petition for rehearing affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition for rehearing, considers and passes upon the Federal ground therein relied upon, we dismiss that subject from view and come to consider whether the record otherwise discloses that a Federal question was so raised below as to support our jurisdiction.

Id. at 663.

In the case at bar, the petitioner's current theory was presented to the Nebraska Supreme Court only as an afterthought in a motion for rehearing after the Nebraska Supreme Court had already issued its opinion.

The Nebraska Supreme Court decided the question of whether the petitioner was entitled to a jury trial on each separate offense pursuant to Nebraska statutory law and constitutional law. Following these guidelines the Nebraska Supreme Court correctly ruled that on the offense of resisting arrest the petitioner had a Sixth Amendment right to a jury trial because this offense carried a maximum penalty in excess of six months imprisonment. *Baldwin v. New York,* 399 U.S. 66 (1970). The court further noted that this right to a jury trial could be waived

by the petitioner if it was voluntarily, expressly and intelligently waived. *State v. Bishop,* 224 Neb. 523, 528, 399 N.W.2d 271, 276 (1987); *Patton v. United States,* 281 U.S. 276 (1930). The Nebraska Supreme Court then correctly concluded that the petitioner had not waived his right to a jury trial on the misdemeanor of resisting arrest and reversed the decision of the lower court on this offense.

Clearly, the two petty offenses which carried maximum penalties of seven days would not entitle the petitioner to a Sixth Amendment right to a jury trial. *See, Baldwin v. New York.* Though Neb.Rev.Stat. § 24-536 (Reissue 1985) does provide a jury trial for cases arising in county court, this right must be properly demanded to be invoked. *State v. Vernon,* 218 Neb. 539, 356 N.W.2d 887 (1984). The *Bishop* court ruled that the petitioner waived this statutory right to a jury trial by not demanding it timely pursuant to local court rules.

The respondent contends that the Nebraska Supreme Court reached the proper decision. The position now being asserted by the petitioner was not properly before the Nebraska Supreme Court. Therefore, the Nebraska Supreme Court did not have an opportunity to pass upon this particular question. The Nebraska Supreme Court, as a matter of comity, should have had a real opportunity to properly pass on the question. Because petitioner failed to provide the Nebraska Supreme Court with such an opportunity, this Court ought not to grant the Petition for Writ of Certiorari.

2. Conflicts presented by petitioner are easily distinguishable on their facts.

The petitioner asserts that the decisions of the Tenth Circuit in *United States v. Potvin,* 481 F.2d 380 (10th Cir.

1973), *Haar v. Hanrahan,* 708 F.2d 1547 (10th Cir. 1983), and the decision of the New Mexico Supreme Court in *Vallejos v. Barnhart,* 102 N.M. 438, 697 P.2d 121 (1985), are contrary to the decision of the Nebraska Supreme Court in *Bishop.* The two cases in the Tenth Circuit, *Potvin* and *Haar,* and the *Vallejos* case in New Mexico are easily distinguishable from the present case on their facts.

In both *Potvin* and *Haar,* the defendants were charged with two *petty* offenses wherein the cumulated penalty exceeded six months. The defendants conceded that a person charged with a petty offense has no constitutional right to a trial by jury. The court held that a person charged with two or more *petty* offenses arising out of the same act, transaction, or occurrence is entitled to a jury trial if he is actually threatened at the commencement of trial with an aggregate potential penalty of greater than six months imprisonment.

In *Vallejos,* the defendants petitioned the New Mexico Supreme Court for a writ of prohibition against various metropolitan court judges to curtail bench trials and require a jury trial in multiple offense cases for which, upon conviction, aggregate sentences could equal or exceed 180 days. The court held that though there was no right to a jury trial in petty offenses the right did attach if the cumulative penalty was greater than 180 days or more on combined charges of first offense traffic violations and one or more additional petty misdemeanors carrying penalties of up to 90 days.

In *Bishop,* the defendant was charged with two petty offenses carrying a penalty of seven days imprisonment

each, and a misdemeanor, carrying a maximum penalty of one year imprisonment. The trial court and the district court both refused to grant the defendant a jury trial on any of the offenses upon which he was charged because of petitioner's failure to demand a jury trial in accordance with local rules. The two petty offenses statutorily gave the petitioner a right to a jury trial. But, note, that such right, because it is statutorily given, must be demanded according to local rules or it is deemed waived. *Vernon,* 218 Neb. at 541. The offense of resisting arrest, because it imposed a sentence greater than six months, constitutionally gave the petitioner a jury trial through the Sixth and Fourteenth Amendment. *State v. Baldwin, supra.*

On the one hand, the Nebraska Supreme Court recognized that the lower courts had erred in not giving the petitioner a jury trial on the charge with a potential penalty greater than six months. *Bishop,* 224 Neb. at 528. The Nebraska Supreme Court reversed and remanded the lower court's decision. On the other hand, the Nebraska Supreme Court held that the two petty offenses only gave the petitioner a statutory right to jury trial. If not demanded properly, that right to jury trial was waived. *Vernon,* 218 Neb. at 539. Accordingly, the Nebraska Supreme Court affirmed the lower court's decision on these two petty counts because the petitioner did not properly demand his statutory right to a jury trial.

The situation that faced the New Mexico Supreme Court and the Tenth Circuit Court of Appeals was not the same situation that faced the Nebraska Supreme Court. *Bishop* is distinguishable on its facts. Respondent in mak-

ing this contention to this Court does not concede that the decisions of the Tenth Circuit Court of Appeals and the New Mexico Supreme Court are correct. Rather, the respondent merely contends that *Bishop* is distinguishable from the above noted cases depended on for support by the petitioner for his writ of certiorari. Thus, this case is inappropriate on its facts to resolve the issue of whether aggregated penalties for petty offenses require a jury trial, since the aggregated petty offense penalties here do not exceed six months.

In *Potvin, Haar,* and *Vallejos,* the defendants were charged with multiple *petty* offenses. Each separate offense had a potential penalty of less than six months. None of the offenses standing alone entitled the defendants to a constitutional right to a jury trial.

In contrast, in *Bishop* the petitioner was charged with two petty offenses and a misdemeanor. Since the potential penalty for the misdemeanor was over six months, the petitioner had a constitutional right to a jury trial and the Nebraska Supreme Court properly reversed the lower court's decision.

Therefore, following the reasoning in *Potvin, Haar,* and *Vallejos,* the petitioner could only get a jury trial on the two remaining petty offenses if the aggregated potential penalty was over six months. The aggregated potential penalty of the two petty offenses in the instant case would be 14 days. Under these facts, even in *Potvin, Haar,* and *Vallejos,* the petitioner would not be entitled to a jury trial.

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CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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